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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ANTONIO OLMOS,

Defendant and Appellant.

B188811

(Los Angeles County  
Super. Ct. No. LA048477)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leland B. Harris, Judge. Reversed and remanded with directions.

Patricia Winters, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Javier Antonio Olmos appeals from the judgment entered following a jury trial that resulted in his convictions for grand theft auto and unlawfully driving or taking a vehicle. Olmos was sentenced to a prison term of four years.

Olmos contends: (1) the trial court erred by denying his *Pitchess* motion<sup>1</sup> for discovery without conducting an in camera review of the requested police personnel records; (2) because violation of Vehicle Code section 10851 is a lesser included offense of grand theft auto, he could not properly be convicted of both offenses; and (3) the trial court committed instructional error. As the parties agree, Olmos's second contention has merit, and his conviction for unlawfully driving or taking a vehicle must be reversed. We further hold that the trial court erred by denying in camera review of peace officer records related to dishonesty. We remand with directions for a limited hearing on that issue.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### 1. *Facts.*

##### a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following. On March 3, 2005, at approximately 2:30 a.m., Los Angeles Police Department (L.A.P.D.) Officers Guillermo Rios and Marlon Lindsey were on patrol in North Hollywood when they observed Olmos run a stop sign. When the officers followed Olmos, he sped up, made an abrupt turn, and drove at an accelerated speed into the rear parking lot of an apartment complex. Olmos stopped the car just in front of a cinder block wall, and the officers pulled their vehicle behind Olmos's, shining their spotlights on the vehicle.

Olmos exited the car and climbed the wall as Officer Rios yelled at him to stop. When Olmos disappeared over the wall, the officers broadcast his description and the

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<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

relevant area to other units. Officer Rios climbed and straddled the wall, but was unable to see where Olmos had gone.

L.A.P.D. Officers Antonio Vargas and his partner, hearing the broadcast, searched for the culprit. They observed a suspect alone in an alley. He fled as soon as he saw the officers, and they lost sight of him.

Officer Oswald Pedemonte, who had also heard the broadcast, observed Olmos nearby. Olmos was perspiring heavily, despite the fact it was a cold night; steam was rising from Olmos's T-shirt and head. Olmos was carrying a Yellow Pages telephone book similar to those that were sitting in front of apartment buildings in the area. Olmos claimed he had just come from his girlfriend's house and was searching for an address. He declined to tell Officer Pedemonte where the girlfriend lived.

While Olmos was being detained by Officer Pedemonte, Officer Lindsey arrived and identified Olmos as the person he had seen fleeing from the car.

When Olmos was detained at the police station, Officer Rios identified him as the person who had run from the car. In particular, Rios observed a white powdery substance on Olmos's jeans and hands. The same powdery substance had gotten on Rios's clothing and hands when he climbed the wall. Olmos also had fresh cuts and abrasions on his wrist, arms, shin, and knee.

The car Olmos was driving, a 2004 Toyota Corolla, had been "hot wired" and stolen sometime during the evening of March 2 or the early morning hours of March 3. A vice grip and screwdrivers were found in the car.

b. *Defense evidence.*

The defense presented the testimony of an eyewitness identification expert regarding various factors that can lead to mistaken identification.

## 2. *Procedure.*

Trial was by jury. Olmos was convicted of grand theft auto (Pen. Code, § 487, subd. (d)(1))<sup>2</sup> and unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)). The trial court found true allegations that Olmos had suffered a prior conviction for unlawfully taking or driving a vehicle within the meaning of section 666.5 and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Olmos to a term of four years in prison. It made a victim restitution award and imposed a restitution fine, a suspended parole revocation fine, and a court security assessment. Olmos appeals.

## DISCUSSION

1. *The trial court erred by denying in camera review of records related to dishonesty.*

### a. *Additional facts.*

Prior to trial, Olmos filed a *Pitchess* motion seeking personnel records of Officer Lindsey concerning: complaints relating to acts of aggressive behavior; actual or attempted violence or excessive force; racial or ethnic bias; “coercive conduct”; “violation of constitutional rights”; “falsifying police reports, lying or fabricating any statements or manufacturing probable cause”; and misconduct amounting to moral turpitude, including “allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, using excessive force, making false arrests, writing false police reports to cover up the use of excessive force, and false or misleading internal reports” including “false overtime or medical reports.”

Trial counsel’s declaration in support of the motion stated the following. Olmos had “nothing to do with any car theft.” Olmos expected the evidence would show Officer Lindsey lied in the police report about his ability to identify Olmos as the person who fled from the vehicle. The original police report prepared by Lindsey did not explain that Lindsey had an opportunity to view the thief; Lindsey wrote a supplemental report three

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<sup>2</sup> All further undesignated statutory references are to the Penal Code.

weeks later that provided additional information about Lindsey's ability to see the perpetrator; and Olmos did not match the description originally broadcast by Lindsey. The declaration further stated that Olmos was arrested as he walked out of a public park on his way home, and detained by police who were responding to a radio call regarding a fleeing suspect. Inexplicably, the declaration also stated that Olmos was detained with two other men.

Among other things, the following items were attached to the *Pitchess* motion:

(1) A March 3, 2005 police report written by Officer Rios that described the police pursuit of the stolen car and the flight of its occupant. In particular, the report described the individual who fled from the car as a male Hispanic, with black short hair, wearing a dark shirt and blue jeans. The report also stated that when apprehended, Olmos was sweaty, and his clothes were wet; he had fresh cuts and was "breathing profusely" [*sic*]. Cement residue found on Olmos's hands was photographed.

(2) The March 20, 2005 supplemental report prepared by Officer Lindsey, which stated it had been "completed to reflect the following facts not contained in the original report." One of those facts was that "[w]hen Olmos exited the stolen vehicle, he looked at Lindsey before climbing on the hood of the vehicle and jumping over the wall.

Lindsey was able to see Olmos's face before Olmos jumped over the wall."

(3) A computer printout of the description of the suspect broadcast by Officer Lindsey, showing the description of the suspect as a male Hispanic with dark short hair, wearing a dark and light blue, or black and white, sweater and blue jeans.

Counsel's declaration in support of the motion averred that the requested information was "material to impeach the officer's fabricated story," "as evidence of the officer's motive to lie or modus operandi in effectuating arrests," and "to show that other persons, besides the defendant, have had similar experiences with the officer."

Inexplicably, the declaration also stated, "The defendant expects the evidence will show that the officer lied about the defendant's behavior through the fabricated or embellished statements of Mrs. Diaz, and these lies led to the filing of additional charges against the defendant."

At the hearing on the *Pitchess* motion, defense counsel argued that Officer Lindsey lied when he identified Olmos. Counsel urged that the original police report gave little information that showed Officer Lindsey was able to observe the suspect's face. However, three weeks after the initial report was filed, Lindsey prepared a supplemental report explaining how he was able to identify Olmos. Counsel argued that these facts, taken together, "suggest that it's very possible that Officer Lindsey fabricated that evidence . . . ."

The motion was opposed by the L.A.P.D. Counsel for the L.A.P.D. argued that Olmos's counsel's declaration was not internally consistent because it failed to explain the cuts and abrasions, the fact Olmos was sweating, and the presence of the white powder from the wall on Olmos's person.

The trial court denied in camera review of the requested documents, finding Olmos had not established good cause. It explained, "the basis for the defense request is a mistaken or wrong identification of the defendant by the officer. [¶] I think this is a matter of opinion. It's not a matter of fact. Even if it were true that the defendant was mistakenly identified, I don't think that that necessarily . . . makes an argument for false statements or deliberate falsification." Olmos contends the trial court erred.

b. *Discussion.*

(i) *Applicable legal principles.*

Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's *Pitchess* discovery of peace officer records. (*People v. Samuels* (2005) 36 Cal.4th 96, 109; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472-1473; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9.) "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) If a defendant shows good cause, the trial court examines the

material sought in camera to determine whether disclosure should be made and discloses “only that information falling within the statutorily defined standards of relevance.” (*Ibid.*) The statutory scheme balances the peace officer’s claim to confidentiality and the defendant’s compelling interest in all information pertinent to the defense. (*People v. Samuels, supra*, at p. 109.)

The California Supreme Court’s decision in *Warrick v. Superior Court, supra*, 35 Cal.4th 1011, clarified the good cause standard. “There is a ‘relatively low threshold’ for establishing the good cause necessary to compel in camera review by the court. [Citations.]” (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) To establish good cause, “defense counsel’s declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges” and articulate how the discovery sought might lead to relevant evidence. (*Warrick, supra*, at p. 1024.) The defense must present “a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.” (*Id.* at p. 1025; *People v. Thompson, supra*, at p. 1316.) “A scenario sufficient to establish a plausible factual foundation ‘is one that *might or could have occurred*. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.’ [Citation.]” (*People v. Thompson, supra*, at p. 1316.) Depending on the facts of the case, “the denial of facts described in the police report may establish a plausible factual foundation.” (*Ibid.*; *Warrick, supra*, at pp. 1024-1025.)

A defendant need not establish that it is reasonably probable the defendant’s version of events actually occurred, show that his story is persuasive or credible, or establish a motive for the alleged officer misconduct. (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1025-1026.)

Discovery is limited to instances of officer misconduct related to the misconduct asserted by the defendant. (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1021.)

Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court’s ruling for

abuse. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

(ii) *The trial court properly found a lack of good cause for in camera review of any records unrelated to dishonesty.*

As an initial matter, we may quickly dispense with any contention that Olmos's motion for in camera review should have been granted in its entirety. As the People correctly argue, the motion was overbroad. Olmos's theory was that Officer Lindsey lied when he identified him. Olmos's motion, however, sought complaints related to a wide variety of categories unrelated to dishonesty, including excessive force, racial and ethnic bias, "coercive conduct," and violation of constitutional rights. Records related to these categories of information were irrelevant and not subject to in camera review. "A request for information that is irrelevant to the pending charges does not satisfy the specificity requirement." (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1096, fn. 7; *Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1021; *People v. Hustead* (1999) 74 Cal.App.4th 410, 416.) A "showing of good cause must be based on a discovery request which is tailored to the specific officer misconduct that is alleged. Thus, 'when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officer is overly broad . . . [instead] 'only complaints by persons who alleged coercive techniques in questioning [are] relevant.' " [Citations.]" (*California Highway Patrol v. Superior Court, supra*, 84 Cal.App.4th at p. 1021.) Here, Olmos failed to articulate how complaints unrelated to dishonesty would support his defense, or impeach the officer's version of events. (See *Warrick v. Superior Court, supra*, at p. 1021.)

(iii) *The trial court erred by denying an in camera review of documents related to dishonesty.*

We come to the opposite conclusion in regard to the court's denial of discovery of records related to dishonesty. *Warrick v. Superior Court, supra*, 35 Cal.4th 1011, controls our analysis. In *Warrick*, the defendant was charged with possession of cocaine for sale and possession of burglary tools. The police report, attributable to three arresting

officers, stated that the officers had been patrolling an area known for narcotics activities when they noticed Warrick standing next to a wall, holding a clear plastic baggie containing what appeared to be rock cocaine. When officers exited their patrol vehicle, Warrick fled, tossing the cocaine on the ground. After a short pursuit, officers arrested Warrick. They found 42 rocks of cocaine on the ground, and porcelain spark plug chips, a common tool used by auto thieves, in Warrick's pocket. (*Id.* at pp. 1016-1017.)

Warrick filed a *Pitchess* motion seeking, inter alia, disclosure of complaints against the three arresting officers for making false arrests, falsifying police reports, or planting evidence. (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1017.) In support of the motion, defense counsel averred that Warrick denied possessing or discarding any rock cocaine; he had been in the area to buy cocaine from a seller; and that the officers, who were unable to determine who threw the cocaine, falsely claimed to have seen Warrick throw the drugs. (*Id.* at p. 1017.) The appellate court concluded Warrick had not established good cause. (*Id.* at p. 1018.)

In rejecting the appellate court's conclusion, the California Supreme Court reasoned that the defendant's denial that he had possessed or discarded the cocaine, coupled with the assertion that the police had falsely accused him, presented a specific factual scenario. (*Warrick v. Superior Court, supra*, 35 Cal.4th. at p. 1023.) Good cause did not require a further showing that the factual scenario proposed by the defendant actually occurred (*id.* at pp. 1023-1024), nor was the defendant required to articulate a motive for the alleged officer misconduct (*id.* at p. 1025).

Here, through counsel's declaration, Olmos denied involvement in the vehicle theft. As in *Warrick*, the declaration in support of the motion asserted that Officer Lindsey's identification of Olmos as the driver of the stolen vehicle, as set forth in the police report, was untruthful. The declaration also stated that the description of the suspect broadcast after the suspect climbed the wall did not match Olmos's appearance. At the hearing, defense counsel stated that Olmos's clothes were wet not because he was sweating, but because it had been raining.

Moreover, Olmos did more than deny he was the culprit. His motion set forth a brief explanation for his presence at the scene. Counsel's declaration stated that Olmos was "arrested as he walked out of a public park. He had crossed the park, walking, on a path as he was making his way home. Upon walking onto the sidewalk at [Wilkinson] and Archwood, Mr. Olmos was detained by police who were responding to a radio call [regarding] a fleeing suspect." In essence, Olmos averred that he was innocently emerging from the park when police mistook him for the robbery suspect, and that Officer Lindsey lied about his ability to identify Olmos. If true, these allegations would have established Olmos's innocence.

Olmos's factual scenario was plausible because it might or could have occurred. (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1026.) According to the police report, officers Lindsey and Rios lost sight of the suspect after he climbed the wall; a second set of officers observed the suspect five minutes later in an alley, but lost sight of him as well; and Olmos was apprehended a few minutes later by a third set of officers. According to counsel's declaration, Olmos did not fit the description of the car thief broadcast by Officer Lindsey. Thus, the factual scenario advanced by Olmos was plausible, in the sense that term is used in *Warrick*. Officers admittedly lost sight of the culprit during the search, and could have mistaken Olmos, who was in the area walking home, for the thief. Officer Lindsey could thereafter have lied about his ability to accurately observe and identify Olmos.

Whether the factual scenario put forth by Olmos inspired belief is not relevant to the determination of whether an in camera review is required. "To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. A trial court hearing a *Pitchess* motion normally has before it only those documents submitted by the parties, plus whatever factual representations counsel may make in arguing the motion. The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive -- a task that in many cases would be tantamount to

determining whether the defendant is probably innocent or probably guilty.” (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1026.)

The People rely on *People v. Thompson, supra*, 141 Cal.App.4th 1312, in support of their position that Olmos failed to establish good cause. In *Thompson*, the defendant was convicted of the sale of cocaine base after selling narcotics to an undercover officer. Thompson sought pretrial *Pitchess* discovery of the records of 11 L.A.P.D. officers who were involved in the operation. The trial court concluded the defendant had failed to establish good cause and denied his *Pitchess* motion without conducting an in camera review. (*Id.* at p. 1316.) The trial court’s ruling was upheld on appeal. The court recognized that the threshold for *Pitchess* discovery was low, and that under some circumstances the mere denial of facts described in a police report is sufficient to establish a plausible factual foundation. (*Id.* at p. 1316.) However, in Thompson’s case, defense counsel’s declaration simply stated that the officers never recovered “buy money” from the defendant, who never offered to sell drugs to the undercover officer; averred that officers saw the defendant and arrested him because he was in an area where they were doing arrests; and, upon discovering his criminal history, planted drugs on him.

*Thompson* held, “This showing is insufficient because it is not internally consistent or complete. We do not reject Thompson’s explanation because it lacked credibility, but because it does not present a factual account of the scope of the alleged police misconduct, and does not explain his own actions in a manner that adequately supports his defense. Thompson, through counsel, denied he was in possession of cocaine or received \$10 from [the undercover officer]. But he does not state a nonculpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any ‘mishandling of the situation’ prior to his detention and arrest. Counsel’s declaration simply denied the elements of the offense charged.” (*People v. Thompson, supra*, 141 Cal.App.4th. at p. 1317.) The court further explained, “Thompson is not asserting that officers planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers conspired to plant narcotics and recorded money in

his possession, and to fabricate virtually all the events preceding and following his arrest.” (*Id.* at p. 1318.)

In contrast to *People v. Thompson*, as we have detailed, Olmos did offer at least a rudimentary nonculpable explanation for his presence, i.e., that he was walking home. Further, Olmos’s version of events is not inherently incompatible with common sense, as was the case in *Thompson*.

The People also point to the erroneous portions of Olmos’s motion cited *supra*, i.e., that two men were arrested with Olmos and that an officer lied through the fabricated statements of one Mrs. Diaz. The People contend that these brief portions of the motion demonstrated the declaration was internally inconsistent. However, the cited portions appear to be typographical errors. They were not relied upon as a basis for the denial below, nor did the parties discuss them. Basing our analysis on these portions of the declaration would elevate form over substance.

In sum, the trial court properly found a lack of good cause for in camera review of complaints relating to excessive force, violence, aggressive behavior, coercive conduct, racial or ethnic bias, and violation of constitutional rights. Olmos established good cause for in camera review of complaints related to dishonesty, i.e., perjury, fabricating police reports or probable cause, or planting evidence.<sup>3</sup>

(iv) *Remedy*.

“Finding the trial court erred in failing to provide an in camera review does not end the analysis; appellant must also demonstrate he was prejudiced from the denial of discovery.” (*People v. Hustead, supra*, 74 Cal.App.4th at p. 418; *People v. Memro* (1985) 38 Cal.3d 658, 684 [“It is settled that an accused must demonstrate that prejudice resulted from a trial court’s error in denying discovery.”].) To establish prejudice, Olmos must show that there was a reasonable probability that the outcome of the case would have been different had information been disclosed to the defense. (*People v. Hustead, supra*, at p. 422.) Because we do not know whether any discoverable information was

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<sup>3</sup> Olmos references *Brady v. Maryland* (1963) 373 U.S. 83, but does not set forth a separate argument that *Brady* error occurred. Accordingly, we do not consider the issue.

contained in Officer Lindsey's file, we cannot meaningfully evaluate the question of prejudice. (*Id.* at pp. 418-419.) We therefore remand the case to the trial court to conduct an in camera review of the relevant records. If no discoverable information is contained in Officer Lindsey's file, the trial court is ordered to reinstate the original judgment and sentence on count 1, and the judgment is ordered affirmed. (*Id.* at p. 419; *People v. Johnson* (2004) 118 Cal.App.4th 292, 304-305.) If the trial court determines that relevant discoverable information exists, the trial court must give Olmos the opportunity to demonstrate whether the information would have led to any relevant, admissible evidence that he could have presented at trial. (*People v. Hustead, supra*, at p. 419.) If appellant can then show prejudice, the trial court should order a new trial. If Olmos is unable to show prejudice, the conviction on count 1 is ordered reinstated, and the judgment is ordered affirmed.

2. *Olmos's conviction for unlawfully driving or taking a vehicle must be dismissed as it is a lesser included offense of grand theft auto.*

As noted, Olmos was convicted of both grand theft auto and unlawfully driving or taking a vehicle (Veh. Code, § 10851.) Olmos contends the Vehicle Code section 10851 conviction cannot stand, as it is a lesser included offense of grand theft auto.

As the People concede, unlawfully driving or taking a vehicle is a lesser included offense of grand theft auto. (*People v. Buss* (1980) 102 Cal.App.3d 781, 784.)

A defendant may not be convicted of both an offense and a lesser included offense. (E.g., *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Reed* (2006) 38 Cal.4th 1224, 1227.) Accordingly, we order the conviction for the lesser offense, violation of Vehicle Code section 10851, dismissed.<sup>4</sup> (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415.)

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<sup>4</sup> Given our resolution of this issue, we need not reach Olmos's contention that the jury instructions conflated the elements of the two offenses such that they became multiple convictions based upon the same act.

3. CALCRIM No. 1800 accurately states the law and, in any event, any error was harmless.

The trial court instructed the jury with CALCRIM 1800, “Theft by larceny.” That instruction provided: “The defendant is charged in Count 1 with Grand Theft Auto. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner’s consent; [¶] 3. When the defendant took the property he intended (to deprive the owner of it permanently/*or to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property*); [¶] AND [¶] 4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.” (Italics added.)

Olmos challenges the italicized portion of the instruction concerning the intent element. He contends that the instruction’s language allows a conviction “not based on the alleged thief’s intent or conduct, but rather entirely on the subjective appreciations of the owner of the property as to when he is no longer ‘enjoying’ his car.” The enjoyment of property, he contends, “is more properly associated with a nuisance or other tort claim.” This, he urges, allowed the jury to convict on a legally inadequate theory.

Olmos’s contention is meritless. When reviewing a purportedly ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury misconstrued or misapplied the challenged instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 252; *People v. Welch* (1999) 20 Cal.4th 701, 766; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) There is no such likelihood in this case.

Section 484, subdivision (a) defines the crime of theft. It provides in pertinent part, “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft.” It is well settled that theft by larceny “requires the intent to *permanently* deprive the owner of possession of the property.” (*People v. Avery* (2002) 27 Cal.4th 49, 54.) In *People v. Avery, supra*, the California Supreme Court held that “an intent to take the property for so extended a

period as to deprive the owner of a major portion of its value or enjoyment satisfies the common law, and therefore California, intent requirement.” (*Id.* at p. 55.)

As is immediately apparent, the language used in the instruction directly tracks the language used by our Supreme Court to describe the intent element. (*People v. Avery, supra*, 27 Cal.4th at p. 55.) Olmos cites no authority for his position that the instruction allows “a finding of theft based solely on the property owner’s subjective enjoyment.” Moreover, the challenged portion of the instruction is not susceptible to the characterization urged by Olmos. The instruction requires that *the defendant must have intended* to deprive the owner of the enjoyment of the property; the instruction’s plain language does not focus upon the *property owner’s* subjective expectations. Reasonable jurors would not have interpreted the language as Olmos suggests. Moreover, Olmos fails to articulate how a defendant might deprive a property owner of “enjoyment” of a vehicle, yet not intend to deprive the owner of the property, while still meeting the other elements set forth in the instruction. We cannot readily conceive of a factual scenario in which this would be possible, and Olmos has offered none.

In any event, it is beyond dispute that no such scenario was presented in the instant case. Defense counsel conceded during argument that the elements of the greater offense of grand theft auto were satisfied, a logical concession given that the evidence showed the car had been hot wired and driven away from the owner’s residence. The defense theory was *not* that Olmos took the car without intending to deprive the owner of possession or enjoyment; it was, instead, that Olmos had been misidentified and was not the culprit. Therefore, even if the instruction was unclear – a contention we have rejected – any such error would be harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18.)

## DISPOSITION

The conviction on count 2, for unlawfully driving or taking a vehicle (Veh. Code, § 10851), is ordered dismissed. For the reasons stated, the remainder of the judgment is reversed and the cause is remanded with directions to the trial court to conduct an in camera hearing on Olmos's *Pitchess* motion consistent with this opinion. If the hearing reveals no discoverable information in Officer Lindsey's personnel file which would lead to admissible evidence helpful to appellant's defense, the trial court shall reinstate the original judgment and sentence on count 1, which shall stand affirmed. If the in camera hearing reveals discoverable information bearing on the officer's honesty which could lead to admissible evidence helpful to appellant in defense of the charge, the trial court shall (1) disclose the names, addresses, and telephone numbers of individuals who have witnessed, or have previously filed complaints about, similar misconduct relating to the officer's honesty; and (2) allow appellant an opportunity to demonstrate prejudice. If appellant is thereafter able to demonstrate prejudice, the trial court shall order a new trial; if he is unable to demonstrate prejudice, the conviction on count 1 is ordered reinstated, and the judgment and sentence on count 1 shall stand affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

CROSKEY, Acting P.J.

KITCHING, J.